

(7)  
No. 96-8837

Supreme Court, U. S.

FILED

MAR 18 1998

CLERK

In The  
**Supreme Court of the United States**

October Term, 1997

◆  
DONALD E. CLEVELAND  
ENRIQUE GRAY-SANTANA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

◆  
On Writ Of Certiorari  
To The United States Court Of Appeals  
For The First Circuit  
◆

REPLY BRIEF FOR PETITIONERS  
◆

NORMAN S. ZALKIND\*  
(Appointed By This Court)  
ELIZABETH A. LUNT  
DAVID DUNCAN  
INGA S. BERNSTEIN  
ZALKIND, RODRIGUEZ,  
LUNT & DUNCAN  
65a Atlantic Avenue  
Boston, MA 02110  
(617) 742-6020

KEVIN S. NIXON  
65a Atlantic Avenue  
Boston, MA 02110  
(617) 227-6363

JOHN H. CUNHA JR.  
(Appointed By This Court)  
CHARLES ALLAN HOPE  
SALSBERG, CUNHA &  
HOLCOMB, P.C.  
20 Winthrop Square  
Boston, MA 02110  
(617) 338-1590

*Counsel for Petitioners*

*\*Counsel of Record*

## TABLE OF CONTENTS

Page

I. THE GOVERNMENT'S ARGUMENTS THAT "CARRY" MEANS "TRANSPORT" FAIL BECAUSE THEY IGNORE THE PLAIN MEANING OF THE PHRASE "CARRY A FIREARM" AS USED IN § 924(c) AND IN THE BROADER CONTEXT OF CHAPTER 44 .....	1
A. The Dictionaries Show The Ordinary Meaning Of "Carry" In The Phrase "Carry A Firearm" Is "Bear A Firearm" And Not "Transport A Firearm." .....	1
B. The Government's Efforts To Distinguish "Carry" From "Transport" Fail.....	3
C. The Legislative History Does Not Support The Government's Broad Construction Of "Carry A Firearm" In § 924(c), Nor Does It Undercut Petitioner's Argument That The Statutory Scheme Supports Reading "Carry A Firearm" As Having Its Ordinary Meaning "Bear On The Person." .....	5
D. Statutes Authorizing Federal Officers To Carry Weapons Do Not Support The Government's Construction Of § 924(c) .....	7
E. State Laws On Carrying Provide No Support For The Government's Broad Reading Of § 924(c).....	9
F. The Mandate Of Statutory Construction Set Forth In <i>Bailey</i> Compels The Conclusion That "Carrying A Firearm" Must Be Read With Its Ordinary Meaning In § 924(c)....	10

## TABLE OF CONTENTS – Continued

	Page
II. THE GOVERNMENT'S ARGUMENT THAT PETITIONERS VIOLATED § 924(c) BY PLACING FIREARMS IN THE TRUNK OF THE VEHICLE IS PROCEDURALLY AND SUBSTANTIVELY INVALID .....	10
A. The Government Is Precluded From Raising In Its Merits Brief A New Theory As To The Basis For Petitioners' Criminal Liability Under § 924(c) .....	12
B. Petitioners Did Not Violate § 924(c) By Placing Firearms In The Trunk "During" An Attempt To Possess Cocaine With Intent To Distribute .....	14
III. CONCLUSION.....	19

## TABLE OF AUTHORITIES

Page

## CASES

<i>Bailey v. United States</i> , 116 S. Ct. 501 (1995) ...	8, 10, 11
<i>Berkemar v. McCarthy</i> , 468 U.S. 443 (1984) .....	14
<i>Bousley v. United States</i> , Supreme Court No. 96-8516.....	11, 12
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 383 (1989) ....	13
<i>City of St. Louis v. Prapnotnik</i> , 485 U.S. 120 (1988) ....	13
<i>Cole v. Arkansas</i> , 333 U.S. 202 (1948).....	14
<i>Common Cause v. Federal Election Commission</i> , 842 F.2d 441 (D.C. Cir. 1988).....	8
<i>Eastman Kodak v. Image Technical Services</i> , 504 U.S. 465 (1992).....	13
<i>Gardebring v. Jenkins</i> , 485 U.S. 425 (1988) .....	13
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987).....	11
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1020 (1992).....	13
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985).....	13
<i>Penry v. Lynaugh</i> , 492 U.S. 314 (1989).....	11
<i>United States v. Akers</i> , 987 F.2d 507 (8th Cir. 1993) ....	18
<i>United States v. Cea</i> , 914 F.2d 881 (7th Cir. 1990).....	17, 18
<i>United States v. Coplon</i> , 185 F.2d 633 (2d Cir. 1950) (Learned Hand, C.J.), cert. denied, 342 U.S. 920 (1952) .....	16

## TABLE OF AUTHORITIES – Continued

Page

<i>United States v. Delvecchio</i> , 816 F.2d 859 (2d Cir. 1987).....	17, 18
<i>United States v. Dworken</i> , 855 F.2d 12 (1st Cir. 1988) ....	18
<i>United States v. Fisher</i> , 3 F.3d 456 (1st Cir. 1993) .....	18
<i>United States v. Foster</i> , 133 F.3d 704 (9th Cir. 1998) (en banc) .....	3
<i>United States v. 14,876 Pieces of Puerto Rico Lottery Tickets</i> , 791 F. Supp. 348 (D. Puerto Rico 1992) .....	8
<i>United States v. Joyce</i> , 693 F.2d 838 (8th Cir. 1982) .....	17, 18
<i>United States v. Mandujano</i> , 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975).....	15
<i>United States v. Manley</i> , 632 F.2d 988 (2d Cir. 1980), cert. denied sub nom. <i>Williams v. United States</i> , 449 U.S. 1112 (1981) .....	15
<i>United States v. Neal</i> , 78 F.3d 906 (4th Cir. 1996), cert. denied, 117 S. Ct. 152 (1996).....	15, 16
<i>United States v. Nelson</i> , 66 F.3d 1042 (9th Cir. 1995).....	15, 16
<i>United States v. Pennyman</i> , 889 F.2d 104 (6th Cir. 1989).....	18
<i>United States v. Polk</i> , 118 F.3d 291 (5th Cir.), cert. denied, 118 S. Ct. 456 (1997) .....	15
<i>United States v. Rivera-Sola</i> , 713 F.2d 869 (1st Cir. 1983).....	16
<i>United States v. Rosalez-Cortez</i> , 19 F.3d 1210 (7th Cir. 1994) .....	18

## TABLE OF AUTHORITIES – Continued

Page

<i>United States v. Sutton</i> , 961 F.2d 476 (4th Cir.), cert. denied, 506 U.S. 858 (1992) .....	18
<i>United States v. Wilks</i> , 46 F.3d 640 (7th Cir. 1995) ....	18

## RULES AND STATUTES

18 U.S.C. § 924.....	<i>passim</i>
Fed. R. Crim. P. 32(e).....	11
Sup. Ct. R. 15.2 .....	13
MODEL PENAL CODE § 5.01(2)(f) and cmt. 6(b)(v), (vi) .....	17
18 U.S.C. §§ 1301, 1302 .....	8
19 U.S.C. § 1305(a) .....	8
21 U.S.C. § 841 .....	7
21 U.S.C. § 846 .....	14
28 U.S.C. § 2255 .....	11

## OTHER AUTHORITIES

<i>Black's Law Dictionary</i> (rev. 4th ed. 1968) .....	2
<i>Black's Law Dictionary</i> (6th ed. 1990).....	2, 3
<i>Webster's New Universal Unabridged Dictionary</i> (2d ed. 1979).....	1, 4
<i>Webster's II New College Dictionary</i> (1995).....	4

**I. THE GOVERNMENT'S ARGUMENTS THAT "CARRY" MEANS "TRANSPORT" FAIL BECAUSE THEY IGNORE THE PLAIN MEANING OF THE PHRASE "CARRY A FIREARM" AS USED IN § 924(c) AND IN THE BROADER CONTEXT OF CHAPTER 44.**

**A. The Dictionaries Show The Ordinary Meaning Of "Carry" In The Phrase "Carry A Firearm" Is "Bear A Firearm" And Not "Transport A Firearm."**

In their opening brief, petitioners noted that "carry" can mean either "transport" or "bear or support."<sup>1</sup> (Pet. Br. 9-18.) Petitioners argued that the context provided by the phrase "carry a firearm" in § 924(c) served to disambiguate "carry" and to make clear that it does not mean "transport a firearm" but rather "bear a firearm." *Id.*

The government responds to petitioners' argument by ignoring it, choosing instead to respond to a position that petitioners did not take. The government asserts that petitioners seek to "limit" the meaning of "carry a firearm" to "transport on the person" while the government

---

<sup>1</sup> The government repeatedly refers to "transport" as the "first" or "preferred" definition of "carry," and suggests that early numerical listing of that meaning demonstrates preference. (Govt. Br. 14 n.4.) This suggestion is spurious. As one dictionary sensibly notes, "[a]ny effort to arrange each entry so that the prevailing current meaning is given first is doomed to failure, since for most words there are a number of senses, on different levels and in different fields, that have equal currency." *Webster's New Universal Unabridged Dictionary*, Introduction at v (2d ed. 1979).

espouses the meaning "transport" whether on the person or in a vehicle. What petitioners argued, however, was that the ordinary meaning of "carry a firearm" requires no movement but only location on the person. Contrary to the government's position, "carry a firearm" is not synonymous with "transport a firearm." By ignoring the context provided by the phrase "carry a firearm" and focusing on the bare word "carry," the government erects a straw position behind which to obscure the clear, ordinary meaning of the phrase "carry a firearm" used in § 924(c).

Petitioners do not take the position the government ascribes to them, "that the term 'carry' may refer to the transportation of an object in a pocket or otherwise on one's person." (Govt. Br. 14-15.) Rather, petitioners note that the ordinary meaning of the phrase "carry a firearm" is, as given in *Black's Law Dictionary*: "To have or bear upon or about one's person, as a watch or a weapon; locomotion not being essential." *Black's Law Dictionary* 269 (rev. 4th ed. 1968) (emphasis added); *Black's Law Dictionary* 214 (6th ed. 1990) (same). The government quotes this definition (Govt. Br. 16) but avoids noticing its significance to the issue at hand.<sup>2</sup>

---

<sup>2</sup> As to the more specific definition of "carry firearms" in *Black's*, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person," the government can only claim that Congress did not intend this to be the "exclusive" definition of "carry firearms." (Govt. Br. 16-17.) Petitioners address this issue in their opening brief. (Pet. Br. 37-38 & 14 n.9.) The government also devotes two pages to exegesis of cases

*Black's*, like all other dictionaries, gives multiple meanings for the word "carry." The existence of multiple meanings implies an ambiguity. However, as *Black's* and other dictionaries note (but the government ignores), the word "carry" takes one of its ordinary meanings, "bear," when used in the phrase "carry a firearm." The disambiguating context provided by the use of the phrase "carry a firearm" in § 924(c) bespeaks Congress' intent to proscribe the bearing of firearms on the person rather than the transporting of firearms.

#### **B. The Government's Efforts To Distinguish "Carry" From "Transport" Fail.**

In *United States v. Foster*, 133 F.3d 704 (9th Cir. 1998) (*en banc*) the Ninth Circuit held that "carry" in "carry a firearm" means "to hold an object while moving from one place to another." Although petitioners do not espouse the Ninth Circuit's position, because it does not comport with the ordinary meaning of the phrase "carry a firearm," petitioners would nevertheless prevail under this

---

cited in the entry for "carry firearms" in the 1968 and 1933 editions of *Black's Law Dictionary* in an attempt to nullify the definition given in both of those editions, as well as all subsequent editions. The effort is wasted. The cases were illustrative, not definitive (that is the job of the definition), and the definition is in accord with the ordinary meaning given in all other dictionaries. There is no need to construe the definition and the effort is far afield of the task at hand, which is to construe § 924(c).

formulation, which has been adopted by the Second and Sixth Circuits as well.<sup>3</sup>

In attempting to rescue its peculiar construction of "carry a firearm," the government asserts that its definition maintains a difference between "carry" and "transport." "Carry," the government says, "emphasizes personal agency" while "'transport' is most often used when the emphasis is on bare movement, bulk goods and common carriers." (Govt. Br. 23.) Nowhere in its discussion of "paradigmatic cases" does the government explain how its definition of "carry a firearm" differs from "transport a firearm." To the contrary, the government's brief hides an implicit concession that the terms "carry" and "transport," as the government defines them, cover exactly the same behavior. If one "carries a firearm" by transporting it in a vehicle, one violates § 924(c) by

---

<sup>3</sup> The government attacks this "immediate accessibility" position, asserting that "[n]o definition of 'carry' in any dictionary supports the proposition that the word refers only to items – whether firearms or otherwise – that are immediately accessible." (Govt. Br. 19.) This is plain wrong. See, e.g., *Webster's New Universal Unabridged Dictionary* at 277, entry 14 (2d ed. 1979) ("To hold or support (something) while moving; as, she is carrying the child in her arms."); *Webster's II New College Dictionary* at 170, entry 4 (1995) ("To hold or bear while moving.") These definitions incorporate both movement and proximity. Petitioners have noted that the "immediate accessibility" definition of "carry firearms" has problems not presented by the ordinary meaning "bear on the person," (see Pet. Br. 45-47 & 49 n.50), but one problem it avoids, which the government does not in its formulation, is conflation of "carry" with "transport," two concepts which Congress kept distinct, as shown by its use of "transport" elsewhere in the statutory scheme. (See Pet. Br. 19-22.)

transporting the firearm, whether in the locked trunk of a car, in the locked luggage compartments of an interstate bus, in a freight car on a train, or in the cargo hold of an ocean liner or a jumbo jet. These may not be, in the government's view, "paradigm" cases under § 924(c), but they are unavoidably covered by the government's definition. As petitioners have shown, Congress used "transport" when it meant to, and must have intended "carry" to mean something distinct, not merely an alternative formulation of "transport" with an ineffably "different emphasis."

**C. The Legislative History Does Not Support The Government's Broad Construction Of "Carry A Firearm" In § 924(c), Nor Does It Undercut Petitioner's Argument That The Statutory Scheme Supports Reading "Carry A Firearm" As Having Its Ordinary Meaning "Bear On The Person."**

The government seeks support for its strained construction of § 924(c) in Representative Poff's comment, advocating for his amendment (which ultimately became § 924(c)), that "[t]he effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home." (Govt. Br. 25.) The government would draw from the Congressman's oratorical flourish the conclusion that the § 924(c) prohibition on "carrying a firearm" punishes all transport of a firearm. This notion falls apart when one considers that § 924(c) applies to federal felonies

committed at home, where transportation does not come into play.<sup>4</sup>

The government also unsuccessfully attacks petitioners' argument that the penalty structure of § 924 supports their position. First, the government asserts that the harsh penalty for carrying merely establishes Congress' intent to severely punish transporting a firearm. (Govt. Br. 30.) This ignores petitioners' point, which is that transportation of firearms is punished elsewhere in § 924, and less severely than the punishment provided under § 924(c), reflecting the less immediate threat posed by transportation of a firearm as opposed to having a firearm on one's person. (Pet. Br. 28.)

The government next argues that the penalties for carrying a firearm were significantly less harsh when § 924(c) was first enacted, vitiating petitioners' argument based on the gradation of punishments. (Govt. Br. 30.) When it was first enacted, § 924(c) provided for a mandatory sentence, a considerably harsher penalty than those provided in the companion prohibitions of § 924, including the penalty for transporting a firearm with intent to commit a felony.<sup>5</sup> That a one year mandatory minimum

---

<sup>4</sup> Representative Poff would certainly have been surprised at the suggestion that a defendant who consummated a drug deal in his apartment with a gun in his pocket was exempt from prosecution because his gun was "at home." As petitioners pointed out, several courts of appeals have expressly found § 924(c) liability under such circumstances. (Pet. Br. 13 n.7.)

<sup>5</sup> Although a much simpler statute as originally enacted in 1968, the gradations of punishments were in place even then. Section 924(a) in 1968 provided for a catch-all maximum penalty of five years for violation of any provision of Chapter 44;

sentence was, at the time, a harsh sentence is made clear by considering that drug felonies charged under 21 U.S.C. § 841, which now carry significant mandatory penalties tied to the quantities of drugs involved, did not carry mandatory minimum penalties at that time. As is the case now, when § 924(c) was originally passed it formed a particularly harsh part of a graded statutory scheme. Petitioners' argument was valid in 1968 and remains valid today.

#### **D. Statutes Authorizing Federal Officers To Carry Weapons Do Not Support The Government's Construction Of § 924(c).**

The government claims that federal statutes outside Chapter 44 authorizing various federal officers to carry firearms support its argument that "carry firearms" means "transport firearms." (Govt. Br. 32 nn.18, 19.) The authorization to carry firearms, the government argues, must encompass transporting firearms in vehicles, because many of these officers make extensive use of automobiles in the course of their duties and must be authorized not only to have the firearm on their person but to place it beside them in their car, or to place it in the

---

§ 924(b) provided for a maximum penalty of ten years for shipping, transporting or receiving a firearm with intent to commit a felony; and § 924(c) provided for a mandatory minimum one year penalty with a maximum of ten years for a first offense and a mandatory minimum two year penalty with a maximum twenty year penalty for a second or subsequent offense.

trunk or glove compartment as well. Congress, the government continues, could not have intended to limit its authorization only to bearing a weapon on the person, and thus its use of the phrase "carry firearms" in these statutes must mean "transport firearms," and if it does Congress must similarly have used the phrase "carry firearms" in § 924(c).

This argument ignores a fundamental difference between the cited statutes and § 924(c). These statutes authorize conduct rather than criminalizing it. The principle of strict construction of penal statutes has no bearing on the construction of these non-penal statutes, and indeed they, unlike § 924(c), are properly construed as broadly as possible given their apparent purpose to aid federal officers in the performance of their official duties.<sup>6</sup>

The construction of these statutes thus sheds no light on § 924(c). As the Court noted in *Bailey v. United States*, 116 S. Ct. 501 (1995) the language of the statute is to be

<sup>6</sup> See *United States v. 14,876 Pieces of Puerto Rico Lottery Tickets*, 791 F. Supp. 345, 347-48 (D. Puerto Rico 1992) (rejecting argument for narrow definition of "lottery ticket" as used in forfeiture statute, 19 U.S.C. § 1305(a), based on narrow definition of "lottery ticket" as used in penal statute, 18 U.S.C. §§ 1301, 1302; statutes not to be construed *in pari materia* that have distinct purposes); *Common Cause v. Federal Election Commission*, 842 F.2d 436, 441 (D.C. Cir. 1988) (rejecting argument that "name" should be construed identically in two statutory provisions: "the assertion that these two sections must be similarly construed ignores the different purposes served by each section and the dissimilar campaign arrangements to which they apply.")

construed in light of its purpose, and the radical difference in purpose between these statutes and § 924(c) defeats any attempt to construe them *in pari materia*.

#### E. State Laws On Carrying Provide No Support For The Government's Broad Reading Of § 924(c).

The government argues that the myriad of state statutes dealing with firearms "demonstrate that the word 'carry,' used in conjunction with a reference to firearms or other weapons, has a clear legal meaning" that accords with the government's position on the ordinary meaning of "carry a firearm." (Govt. Br. 34.) These statutes, which the government notes are difficult to categorize due to "overlapping prohibitions that impose different requirements on carrying different sorts of weapons in different circumstances," *id.* at n.20, provide no such "clear legal meaning."

The government does not, and could not, argue that § 924(c) is to be construed *in pari materia* with these statutes. Nothing suggests that Congress modeled § 924(c) on these various state statutes, or on any particular state's statutory scheme. Section 924(c), unlike the state statutes the government appeals to, addresses the use or carrying of a firearm in connection with the commission of a crime. Resort to state statutes that use the phrase "carry a firearm" is thus of no help in construing the language of § 924(c), except insofar as these statutes might illustrate the ordinary meaning of the phrase "carry a firearm" that Congress used. The welter of terms and qualifiers used by the states, touched on by the government's brief survey, makes it virtually impossible for the government to find aid in these statutes for its supposed meaning.

**F. The Mandate Of Statutory Construction Set Forth In *Bailey* Compels The Conclusion That "Carrying A Firearm" Must Be Read With Its Ordinary Meaning In § 924(c).**

Some forty pages into its brief, the government acknowledges the existence of the Court's *Bailey* decision and the principle it stands for, that "the words Congress used in § 924(c), like the words it has used in other statutes, should be construed in their ordinary meanings, informed by the statute's history and context." (Govt. Br. 40.) Unfortunately the government utterly ignores this principle in the preceding 39 pages of its brief. The government ignores the context in which Congress used the verb "carry," viz., "carry a firearm;" ignores the ordinary meaning of this phrase found in every English language dictionary; and minimizes the force of the broader context of the statutory scheme of which § 924(c) is a part. The Court's decision in *Bailey* and the factors it employed to construe the "use" prong of § 924(c), contrary to the government's assertion, point decisively toward construing the phrase "carry a firearm" used in § 924(c) in its ordinary meaning, to bear a firearm upon the person.

**II. THE GOVERNMENT'S ARGUMENT THAT PETITIONERS VIOLATED § 924(c) BY PLACING FIREARMS IN THE TRUNK OF THE VEHICLE IS PROCEDURALLY AND SUBSTANTIVELY INVALID.**

Recognizing that petitioners prevail whether "carry a firearm" means either "on the person" or "immediately accessible," the government in its brief raises for the first time a theory of liability that was never addressed below:

that petitioners violated § 924(c) by putting the guns in the trunk of the vehicle earlier in the day of their arrest. On the basis of this new theory the government argues that petitioners' convictions should be affirmed and suggests that the writ of certiorari may be dismissed as improvidently granted. (Govt. Br. 44-45.)<sup>7</sup> The

---

<sup>7</sup> In a footnote the government suggests for the first time that petitioners may be procedurally barred from raising the § 924(c) issue if the case comes to the Court on a 28 U.S.C. § 2255 motion, depending on the outcome of a case now before the Court, *Bousley v. United States*, Supreme Court No. 96-8516. (Govt. Br. 45 n.30.) *Bousley*, which arose on a § 2255 motion filed years after the judgment became final after direct appeal, has no bearing on this case, in which there is still no final judgment. The government noted this distinction, and its significance, in its brief to the Court in *Bousley*: "If *Bailey* had been handed down while petitioner's case was pending on direct review, petitioner could, *without doubt*, have claimed the benefit of the construction of Section 924(c) announced in *Bailey*. See *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989)." (Brief for the United States, *Bousley v. United States*, 17) (emphasis added). Under *Griffith* the merits of petitioners' § 924(c) issue are properly before the Court. In any event § 2255 is not the vehicle by which the issue is here. Gray-Santana raised the issue by motion on December 8, 1995, J.A. 41-42, and judgment entered May 26, 1996, J.A. 73. Although Cleveland cited § 2255 in his post-judgment motion, the trial court considered it as part of the criminal case rather than as a collateral matter. J.A. 61. The First Circuit consolidated this issue with petitioners' other issues, and decided it on the merits. Consideration of this issue on direct appeal is permitted under Fed. R. Crim. P. 32(e), which allows a motion to withdraw a guilty plea after sentence *either* under § 2255 *or* on direct appeal. Additionally, the government conceded this point in its brief below: "[the First Circuit]'s ability to consider the defendant's claims even for the first time on direct appeal renders unnecessary an extended inquiry into those procedural

government's new argument is not properly before the Court. Moreover, this argument is substantively invalid, since petitioners' activities prior to, and including, putting the guns in the trunk constituted "mere preparation," not an attempt to possess cocaine with intent to distribute. Consequently, putting the guns in the trunk did not constitute carrying "during" the predicate offense under § 924(c).

**A. The Government Is Precluded From Raising In Its Merits Brief A New Theory As To The Basis For Petitioners' Criminal Liability Under § 924(c).**

The government raises, for the first time, a new theory of liability for petitioners – that they "carried" the guns to their car. (Govt. Br. 45.) This new theory seeks to avoid the plainly stated question presented, "whether a defendant 'carries' a firearm . . . if [he] has it with him in . . . the trunk of a vehicle." (Govt. Br. I.) This theory was not raised by the government in the courts below or addressed by those courts.<sup>8</sup>

---

complexities." (Brief for Appellee 41, *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (No. 96-1043, 96-1659).) The government has thus waived any claim that petitioners are procedurally barred on the merits. On all counts the Court's decision in *Bousley* does not affect this case.

<sup>8</sup> The government's argument to the First Circuit that petitioners "carried a firearm" was totally focused on accessibility and the question of whether inaccessible guns are carried in a vehicle (Brief for Appellee 43-52, *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (No. 96-1043, 96-1659).) The government concluded, "[w]here Cleveland and Gray

As the government acknowledges in its brief (Govt. Br. 45), it had an obligation "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15.2. Furthermore,

Any objection to consideration of a question based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

*Id.* The Court has strictly enforced this rule by exercising its discretion to deem waived arguments which respondents fail to raise in the courts below and in their oppositions to certiorari. See, e.g., *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989); *Gardebring v. Jenkins*, 485 U.S. 415, 425 n.12 (1988); *City of St. Louis v. Prapnotnik*, 485 U.S. 112, 120 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). The Court has precluded respondents from raising in their briefs new factual premises which were not raised in their oppositions to certiorari or in the courts below. See, e.g., *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 465 n.10 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 n.9 (1992).

---

acknowledge transporting three loaded firearms in the trunk of their car for the express purpose of using them to rob their would-be suppliers at an imminent drug exchange, there can, as the district court found, be no error in allowing their pleas to stand." *Id.* at 51-52. Nor did the First Circuit consider anything outside of the time period when the guns were in the trunk while upholding the conviction. J.A. 103-114. The district court also clearly based petitioners' convictions on its finding that petitioners "carried the guns in the Mazda." J.A. 55, 70.

The case at bar presents "no unusual circumstances" which would justify permitting the government to raise a new factual theory of liability at this late stage. See *Berkemar v. McCarthy*, 468 U.S. 420, 443 n.38 (1984).<sup>9</sup> Therefore, the Court should decide the question under the same factual assumptions as did the Court of Appeals.

**B. Petitioners Did Not Violate § 924(c) By Placing Firearms In The Trunk "During" An Attempt To Possess Cocaine With Intent To Distribute.**

There is good reason why government's newfound theory – that petitioners' convictions under § 924(c) can be predicated on their carrying the guns to the trunk of the vehicle – was neither raised by the government in the courts below nor addressed by those courts: under no conceivable stretch of the well-established case law on the subject could placing the guns in the trunk be deemed to have occurred *during* commission of an attempt to possess cocaine with intent to distribute.<sup>10</sup>

<sup>9</sup> For the Court to affirm petitioners' convictions under § 924(c) on the basis of a factual theory which the district court did not consider would violate the Court's ruling in *Cole v. Arkansas*, 333 U.S. 196, 202 (1948), that "to conform to due process of law, petitioners [are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

<sup>10</sup> In Counts Four and Five petitioners Cleveland and Gray-Santana, respectively, were charged with using and carrying three firearms "during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846." J.A. 5, 6.

Federal law provides no statutory definition of attempt. E.g., *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 152 (1996). However, there is "fundamental agreement" in the case law that conduct constitutes a criminal attempt only if (1) the defendant "act[ed] with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting"; and (2) the defendant "engaged in conduct which constitutes a substantial step toward commission of the crime." *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). "A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *Id.* It is something more than "mere preparation," but rather is "an appreciable fragment of a crime, an action of such substantiality that, unless frustrated, the crime would have occurred." *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995) (citation omitted). A substantial step has been defined as an action or actions "adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime." *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980), *cert. denied sub nom. Williams v. United States*, 449 U.S. 1112 (1981). Hence, "[l]iability for attempt attaches if the defendant's actions have proceeded to the point where, if not interrupted, [they] would culminate in the commission of the underlying crime." *United States v. Polk*, 118 F.3d 286, 291 (5th Cir.), *cert. denied*, 118 S. Ct. 456 (1997).

Even where it is clear that a defendant intended to commit the underlying crime, attempt is not proven until his or her actions "cross the line between preparation and

attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *Nelson*, 66 F.3d at 1042 (internal quotation marks omitted). It is this element that distinguishes attempt from conspiracy. *Id.* at 1044 ("the overt act required as an element [of conspiracy] need not have as immediate a connection to the intended crime as the substantial step required for an attempt") (citation omitted).

There being "no definite line" between mere preparation and attempt, *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (Learned Hand, C.J.), *cert. denied*, 342 U.S. 920 (1952), the determination as to whether an attempt has occurred is necessarily fact-specific. *Neal*, 78 F.3d at 906; *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983). In the case at bar, the petitioners' conduct did not "cross the line between preparation and attempt" until, at the earliest, around 4:00 p.m. when they arrived at the Symphony Hall area of Boston to meet with the suppliers and to make arrangements to receive the cocaine. J.A. 13. At the time the guns were put in the vehicle, earlier in the day, petitioners had not even determined a time and place to meet the suppliers in order to arrange another time and place to receive the cocaine.<sup>11</sup> At that time,

---

<sup>11</sup> Moreover, petitioners' plans on October 18, 1994 were distinctly vague. Petitioners met and discussed either "stealing or ripping off" cocaine which Gray-Santana had ordered from Juan Rodriguez and Ramon Vasquez. J.A. 13. Gray-Santana told Cleveland that he might get the drugs on consignment (Hearing on Motion to Suppress, May 1, 1995, at 54), thus obviating any need to use a weapon. No agreement between petitioners and suppliers as to quantity and price of drugs is referred to in the

petitioners' actions were far from the point where, if not interrupted, they would have culminated in possession of cocaine with intent to distribute. Moreover, placing the guns in the vehicle was not, per se, a substantial step which could transform preparation into attempt, since possession of materials to be employed in the commission of a crime constitutes a substantial step only if such possession is "at or near the place contemplated for the commission of the crime." MODEL PENAL CODE § 5.01(2)(f) and cmt. 6(b)(v), (vi).

Convictions for attempt to possess controlled substances have been reversed for insufficient evidence in cases where plans to obtain drugs were much closer to execution than those in the case at bar. *See, e.g., United States v. Cea*, 914 F.2d 881 (7th Cir. 1990) (defendant met with suppliers four times, called suppliers numerous times, settled on quantity and price, found a prospective buyer, brought the buyer to meet the supplier, agreed to meet with supplier); *United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987) (defendants had met the suppliers and had agreed as to an exact quantity and price, and had arranged an exact time and place for the transaction to take place); *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982) (defendant discussed drug purchase with informant, met with purported supplier, offered a price, and actually handled a package supposedly containing the drugs to be purchased).

---

record, although Gray-Santana stated that he intended to receive one kilogram of cocaine. J.A. 26.

Unlike the situations in *Cea*, *Delvecchio* and *Joyce*, in the case at bar petitioners' plans were tentative and unfocussed: no agreement had been reached with the suppliers as to exact quantity and price, there had been no meetings with the suppliers, there was no evidence of more than a single contact with the suppliers, and no exact time and place for a meeting, let alone a transfer of drugs, had been arranged.

Cases where evidence was found sufficient to support convictions of attempt to possess controlled substances with intent to distribute present situations where the defendants' actions came far closer to culminating in actual possession than did the petitioners' actions up to and including the point where they put the guns in the vehicle. In many of these cases the defendants were at or en route to the scene of the planned drug transaction, which was frustrated by external circumstances. *See, e.g., United States v. Wilks*, 46 F.3d 640 (7th Cir. 1995); *United States v. Rosalez-Cortez*, 19 F.3d 1210 (7th Cir. 1994); *United States v. Akers*, 987 F.2d 507 (8th Cir. 1993).

Petitioners' actions are distinguishable also from those of defendants in cases where the attempt to purchase drugs was not thwarted at the scene of the planned transfer of drugs, but defendants had taken extensive actions which brought the planned transactions much closer to fruition than did petitioners' actions. *See, e.g., United States v. Fisher*, 3 F.3d 456 (1st Cir. 1993); *United States v. Sutton*, 961 F.2d 476 (4th Cir.), *cert. denied*, 506 U.S. 858 (1992); *United States v. Pennyman*, 889 F.2d 104 (6th Cir. 1989); *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988).

For the foregoing reasons, the government's eleventh-hour attempt to salvage the convictions in this case is not properly before the Court. Moreover, the government's new argument is without merit since petitioners placed the guns in the trunk before, and not during, commission of the attempt to possess cocaine with intent to distribute.

### III. CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

NORMAN S. ZALKIND,  
Counsel of Record  
ELIZABETH A. LUNT  
DAVID DUNCAN  
INGA S. BERNSTEIN  
ZALKIND, RODRIGUEZ, LUNT  
& DUNCAN  
65a Atlantic Avenue  
Boston, MA 02110  
(617) 742-6020

KEVIN S. NIXON  
65a Atlantic Avenue  
Boston, MA 02110  
(617) 227-6363  
Counsel for Gray-Santana

JOHN H. CUNHA JR.  
CHARLES ALLAN HOPE  
SALSBERG, CUNHA  
& HOLCOMB, P.C.  
20 Winthrop Square  
Boston, MA 02110  
(617) 338-1590  
Counsel for Cleveland